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88-598
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GEORGE RAKOVICH,

Petitioner,

v.

GREGORY WADE, DARRYL DRAKE and CHESTER KASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the *Harlow-Anderson* qualified immunity defense for §1983 liability requires a case on all fours as a condition precedent for finding a violation of clearly settled law.

(2) Whether the *Harlow-Anderson* qualified immunity defense is available in cases involving intentional retaliation for the exercise of clearly settled First Amendment rights.

(3) Whether the *Mount Healthy* causation test for First Amendment liability under §1983 is a constitutional requirement or a damages requirement.

PARTIES TO THE PROCEEDING

The Petitioner is George Rakovich and the Respondents are Greenfield police officers Gregory Wade and Darryl Drake and Greenfield police chief Chester Kass.

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In The

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GEORGE RAKOVICH,

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v.

GREGORY WADE, DARRYL DRAKE and CHESTER KASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, George Rakovich, respectfully prays that a writ of certiorari be issued to review the en banc opinion of the Seventh Circuit entered on June 8, 1988, *petition for rehearing denied*, July 14, 1988.

OPINIONS BELOW

The en banc opinion of the court below, reported at 850 F.2d 1180, is reproduced in its entirely as Appendix A. The opinion of the Seventh Circuit panel in *Rakovich v.*

Wade, is reported at 819 F.2d 1393 (7th Cir. 1987). The Seventh Circuit's Order of August 25, 1987, which vacated the panel's opinion and judgment and granted the petition for rehearing en banc, is reported at 850 F.2d 1179, and reproduced in its entirety as Appendix B. The Decision and Order of the District Court, dated March 4, 1985, is reported at 602 F.Supp. 1444 and is reproduced in its entirety as Appendix C. The Order of the Seventh Circuit, dated July 14, 1988, denying, after consideration, Petitioner's petition for a second rehearing en banc, is reproduced in its entirety as Appendix D.

JURISDICTION

This Petition for Certiorari is filed within ninety days of the Seventh Circuit's denial, after consideration, of Petitioner's petition for a second rehearing en banc. *See* Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 and the First Amendment to the United States Constitution are involved in this case.

STATEMENT OF THE CASE

Alleging violations of his First Amendment rights, Petitioner George Rakovich filed this suit for damages under 42 U.S.C. §1983 against the Respondents, police officers Gregory Wade and Darryl Drake and their superior, police chief Chester Kass. The jury, after trial, found that Respondents Wade and Drake, pursuant to the direction of Respondent Kass, had unconstitutionally retaliated against Petitioner, then a member of the Greenfield Civil Service Commission, by investigating him, photographing him, recording his conversations and releasing a statement to the press that he would be criminally prosecuted.

The evidence at trial showed that Petitioner had actively expressed his political opposition to the mayor of Greenfield and other officials, and had opposed a commendation of a Greenfield police officer given for her role in arresting burglary suspects at a local business enterprise called "Cars, Unlimited."

The jury found that because of Petitioner's political, First-Amendment-protected activities, Respondents investigated him, photographed him, recorded his conversations, and requested that he be summoned before the Milwaukee County District Attorney to be charged with violations of Wisconsin criminal law, even though Respondents knew that there was no reasonable basis for the surveillance or the charges. He also proved that Respondents disclosed to the media that he was the object of a criminal investigation and had been ordered to appear before the District Attorney.

Rejecting the Respondents' contention that they had investigated Petitioner because he was harassing a state's

witness, the jury found that Respondents had violated Petitioner's First Amendment rights. The jury accordingly awarded Petitioner compensatory damages of $50,000 and assessed punitive damages of $25,000 against Respondent Wade, $25,000 against Respondent Drake and $40,000 against Respondent Kass. The District Court thereafter denied various posttrial motions of the Respondents, including motions for judgment n.o.v. or for a new trial, and also awarded attorney's fees to Petitioner. *See* Appendix C, p. 11.

On review, with Judge Coffey dissenting as to liability, a panel of the Seventh Circuit affirmed the jury's finding of liability but, determining that the damage awards were excessive, remanded to the District Court for a new trial limited to the issue of damages. *Rakovich v. Wade*, 819 F.2d 1393 (7th Cir. 1987). Thereafter, on August 25, 1987, the Seventh Circuit issued an order vacating the opinion of the panel and setting the case for rehearing en banc. *See* Appendix B, p. 2. Judge Ripple, a member of the original panel, joined by Judge Cudahy, dissented and accused the majority of granting rehearing en banc "not because of the issues properly and adequately raised but because of the status of the losing party [police officers]." Noting that the Respondents had not raised any legal issue of general importance and that they were only seeking to set aside a jury verdict, Judges Ripple and Cudahy expressed the hope that "no member of the court believes . . . than an en banc proceeding may be used as a vehicle to permit judges to further their own ideological predelictions."

The en banc panel subsequently overturned the jury verdict and judgment in an opinion which set out its version of the facts in exhaustive detail. *See* Appendix A, pp.

22-35. It held for Respondents on two alternative grounds: first, because it found insufficient evidence for the jury to find a violation of Petitioner's First Amendment rights within the meaning of this Court's decision in *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977); and second, because even if there were sufficient evidence for such a finding of liability, the Respondents were protected by the objective qualified immunity test of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 107 S.Ct. 3034 (1987) since their 1981 conduct did not violate clearly settled law.

Judges Cudahy and Ripple dissented. Judge Ripple in particular argued that as to the *Mount Healthy* issue of liability, the en banc court had properly taken upon itself the role of factfinder and had applied an erroneous standard as well. As to the *Harlow-Anderson* qualified immunity issue, he maintained that the majority had improperly required a case on all fours as a condition precedent to finding a violation of clearly First Amendment settled law. Judge Ripple concluded:

> The court's approach to the need for "closely analogous" case law sends a clear message to those officials, hopefully small in number, who are willing to use their power to inhibit freedom of speech: Choose a novel approach to your abuse of power. Avoid a *modus operandi* that someone has tried before. Create a verbal smokescreen by articulating fabricated justifications for your action. Then, when you are sued, point to the fact that there has never been a case like yours.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S QUALIFIED IMMUNITY RULING, IN ITS REQUIREMENT OF A CASE ON POINT, CONFLICTS WITH THIS COURT'S DECISIONS.

The Seventh Circuit erred in requiring a case directly on point as a condition precedent for finding a violation of clearly settled law. As this Court made clear in *Anderson v. Creighton*, *supra*, a case on all fours is not required for a finding of liability. Indeed, this Court has never required a case on all fours. Rather, what *is* required for liability is a judicial determination that "in light of preexisting law the unlawfulness must be apparent." 107 S.Ct. at 3039.

In this case, as observed by the Seventh Circuit, the District Court defined the qualified immunity question "as whether it was violative of the first amendment to retaliate against a person simply because the person complained that individual police officers or the police department did not properly conduct their duties." The Seventh Circuit conceded that its 1978 decision in *Buise v. Hudkins*, 584 F.2d 223, 229 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979), "restated the well-established rule that 'an act in retaliation for the exercise of a constitutionally protected right [for example, a first amendment interest], is actionable under Section 1983.' " Nevertheless, the Seventh Circuit inexplicably called the District Court's definition "a very broad statement of first amendment law" and consequently did not use it in making the clearly settled law inquiry. The result is that its qualified immunity decision conflicts with this Court's approach to clearly settled law as set out in *Harlow* and *Anderson*.

The conflict arises from the fact that this statement of First Amendment retaliation law is no more broad and no less clearly settled than the rule that racial discrimination in connection with public school admissions is prohibited. Indeed, a panel of the Seventh Circuit recently dealt with such a case in which it correctly asserted that *Harlow* did not require a case precisely on point factually. *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986).[1] Surely the same is true of the rule that it violates the First Amendment to retaliate against a person for the exercise of his or her First Amendment rights.[2] The point is that certain rules can be stated more generally than others and still provide effective and fair notice to government officials and employees of applicability to fact situations that may arise in the future.

Moreover, the Seventh Circuit asserted that First Amendment cases involving a balancing of interests by law enforcement officers require a highly fact-specific application of the clearly settled law standard. In its view, because this is a mixed motive case, the Respondents had to

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[1] In *Wade*, the plaintiff sued a principal for discouraging him from registering his children in a public school in 1980 because of the community's racial hostility. The Seventh Circuit held that the district court correctly ruled that the defendant was not protected by qualified immunity. The law prohibiting racial discrimination in connection with public school admissions was clearly settled for more than 30 years. In addition, the defendant should have known that it was unconstitutional intentionally to discourage a black parent from enrolling his children by threatening the parent with the possible dangers that might ensue. It was irrelevant, the court stated, that there was no case precisely on point factually because *Harlow* did not require such factual specificity. Here, the legal norms governing the defendant's behavior were clearly established in 1980 because those norms prohibited indirect coercive pressure directed at blacks wishing to attend public schools.

[2] *See* Petitioner's Argument IV.

balance the Petitioner's First Amendment rights against legitimate interests in law enforcement. The flaw in this reasoning is that retaliation for the exercise of First Amendment rights is never constitutionally justifiable, even in a mixed motive case. There is no balancing in such cases. Indeed, by the Seventh Circuit's own admission, this general rule was already clearly settled in 1981. This is demonstrated by the Seventh Circuit's own discussion of relevant cases involving retaliation in the public workplace, surveillance of political groups or organizations, and arresting or penalizing persons solely because of their First Amendment activities. Petitioner submits that if this rule of First Amendment retaliation law was clearly settled for public employees, it should be settled for citizens like Petitioner.

In connection with its balancing contention, the Seventh Circuit also seriously misunderstood this Court's First Amendment decision in *Mount Healthy City School District v. Doyle, supra,* by reading it solely as a First Amendment decision. As will be seen later,[3] only the first part of the *Mount Healthy* test—that part requiring a plaintiff to prove that an impermissible political motivation by the defendant was a substantial factor in causing plaintiff's First Amendment deprivation—is a constitutional rule. The second part—that part permitting a defendant to escape liability for lost wages if he or she can establish by a preponderance of the evidence that plaintiff would have suffered the same consequences even in the absence of the impermissible political motivation—*is a damages rule, not a constitutional rule.*

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[3] *See* Argument V.

Contrast the present case with *Anderson*, where this Court's fact specific approach to clearly settled law was entirely appropriate because the constitutional provision dealt with is the Fourth Amendment and its reasonableness requirement. This area of the law is constantly evolving and is particularly very fact specific. *Anderson* correctly considered it unfair for law enforcement officers to have to guess at the proper Fourth Amendment standards, under threat of damages liability for a wrong though reasonable decision, where the courts themselves were in disagreement. As a result, this Court thought it necessary to adopt a clearly settled law standard declaring that "a federal law enforcement officer who participates in a search that violates the Fourth Amendment may [not] be held personally liable for money damages if a reasonable officer would have believed that the search comported with the Fourth Amendment." *Anderson v. Creighton*, 107 S.Ct. at 3037.[4]

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[4] The unique fact specific nature of Fourth Amendment cases is borne out by *Tarantino v. Baker*, 825 F.2d 772 (4th Cir. 1987). In this case, the Fourth Circuit ruled that in August, 1985, it was not clearly settled that a police officer violated the Fourth Amendment when, after receiving an anonymous tip, but without a search warrant, he went to plaintiff's building (a boarded-up former general store), shined his flashlight through a crack, saw what appeared to be marijuana plants inside, and only thereafter obtained a search warrant which resulted in the seizure of those plants and the ultimately unsuccessful prosecution of the plaintiff. The court said:

> [Defendant's] actions certainly test the extremes to which a citizen must go to prevent police officers from "searching" with impunity through the cracks in his otherwise enclosed and private spheres. Given the unsettled and fact-specific nature of the precedents, however, and the absence of such unambiguous indicia of a violation of a reasonable expectation of privacy as, for example, intrusion into the curtilage of a residence, we cannot agree that [defendant's] actions violated a "clearly established" constitutional standard.

Id. at 779.

Consequently, there is a fundamental inconsistency between the Seventh Circuit's clearly settled law standard—whether it be called, as the Seventh Circuit did, an inquiry into the existence of "closely conforming" case law or "closely analogous" case law—and this Court's standard in *Anderson v. Creighton*. The latter standard realistically calls for an inquiry into whether, "in light of preexisting law, the unlawfulness [was] apparent." It does not require a determination "that the very action in question has previously been found unlawful." 107 S.Ct. at 3039. Petitioner contends that the Seventh Circuit's discussion of prevailing First Amendment law in 1981 demonstrates that Respondents indeed violated clearly settled First Amendment law. Only by insisting on a case on point, and through the making of arcane distinctions without differences among relevant cases,[5] was the Seventh Circuit able to evade this conclusion.

Petitioner must finally emphasize that, despite the Seventh Circuit's exhaustive discussion of the facts, its error was not one of fact but was rather one of law regarding the correct standard for clearly settled law. The Seventh Circuit used a standard which is inconsistent with the standard set out in this Court's own decisions. The Seventh Circuit's unrealistic standard makes it virtually impossible for a law enforcement officer to be held liable for constitutional violations in general, and for First Amendment violations based on retaliation in particular.

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[5] *See* the Seventh Circuit's discussion of the two *Benson* cases, Appendix A, p. 62, where it strained to distinguish these cases which dealt with the denial, in violation of the First Amendment, of a benefit to a previously discharged employee. *Benson v. Scott*, 734 F.2d 1181 (7th Cir.), *cert. denied*, 469 U.S. 1019 (1984) and 786 F.2d 268 (7th Cir. 1986).

II.

THE SEVENTH CIRCUIT'S QUALIFIED IMMUNITY RULING, IN ITS REQUIREMENT OF A CASE ON POINT, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

While using the language of "closely conforming" or "closely analogous" case law, the Seventh Circuit, as argued earlier, in reality insisted that a case on all fours is required for a finding that a defendant violated clearly settled First Amendment law for §1983 qualified immunity purposes. However, this standard for clearly settled law directly conflicts with the standard used by the Third, Fifth and Eighth Circuits. Thus, this Court should grant Petitioner's petition for writ of certiorari to resolve this conflict and articulate a uniform standard for the application of the *Harlow-Anderson* clearly settled law requirement for liability. It is also significant that this issue is a recurring one that will not simply go away.

Petitioner submits that there is a conflict between the clearly settled law standard used by the Seventh Circuit and that used by the Third Circuit. In *Hicks v. Feeney*, 770 F.2d 375 (3d Cir. 1985), a case involving the alleged violation of the plaintiff probationer's procedural due process rights through his involuntary confinement in a mental hospital, the Third Circuit remanded to the district court for determination of the clearly settled law issue. While the district court had used a "strict standard" which required near factual identity between cases, the Third Circuit expressly rejected such a standard

> in favor of a more flexible approach requiring some factual correspondence and demanding that officials apply well developed legal principles to the instant case . . . The standard involves an inquiry into the general legal principles governing analogous factual situations, if any, and a subsequent determination

> whether the official should have related this established law to the instant situation. This approach eliminates unexpected liability for public officials as well as prevents the occurrence of a mere "factual wrinkle" in an area of clearly established law from barring suit altogether.

Id. at 379-80.[6]

There is an identical conflict between the Seventh Circuit and the Fifth Circuit. Thus, where the plaintiff public school student alleged that as punishment in January, 1985, she had been tied to a chair for one school day and part of another, and was denied access to the bathroom, the Fifth Circuit held that the defendant school teacher and principal violated clearly settled substantive due process law protecting the right to be free from bodily restraint. There need not be a case factually on all fours: "It suffices that the teacher be aware of general, well-developed legal principles." *Jefferson v. Yselta Indep. School Dist.*, 817 F.2d 303, 305 (5th Cir. 1987).

Finally, there is an identical conflict between the Seventh Circuit and the Eighth Circuit with regard to the

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[6] *See also Sourbeer v. Robinson*, 791 F.2d 1094 (3d Cir. 1986), where the Third Circuit held that prison officials violated clearly settled law in 1976-77 when they placed plaintiff in administrative custody without following certain procedural safeguards. Even though there was no Third Circuit or Supreme Court case on point which dealt with an unsentenced inmate such as plaintiff, the Third Circuit noted that there were three prior Third Circuit decisions which clearly established that a liberty interest triggering procedural due process protections was implicated in administrative custody placements involving sentenced inmates. These decisions could not meaningfully be distinguished on the basis suggested by defendants, according to the court. In this connection, the Third Circuit emphasized that the clearly settled law inquiry did not require "precise" factual correspondence with precedents but only "some" factual correspondence coupled with an official's obligation to apply general legal principles.

fact specificity required for clearly settled law purposes. The Eighth Circuit, reversing the district court, held that school officials found to have fired a principal in violation of the First Amendment were not protected by qualified immunity. Even though this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983) had not yet been handed down at the time of defendants' conduct in 1981, the Eighth Circuit asserted that the legal principle that school employees have rights to free speech was clearly established long before. According to the Eighth Circuit, defendants needed no legal training to know that they could not fire plaintiff for what he said at a public meeting about another teacher's transfer within the school district and the defendants' alleged lack of professionalism. These were protected issues of public concern. *Lewis v. Harrison School Dist. No. 1*, 805 F.2d 310 (8th Cir. 1986).

Thus, the Seventh Circuit's qualified immunity ruling conflicts with decisions of the Third, Fifth and Eighth Circuits.

III.

RESOLUTION OF THIS QUALIFIED IMMUNITY CONFLICT REGARDING THE REQUIREMENT OF A CASE ON POINT IS NECESSARY TO PROTECT IMPORTANT INTERESTS SERVED BY §1983 AND QUALIFIED IMMUNITY.

This Court has long acknowledged that the qualified immunity protection afforded defendants against §1983 liability is designed to preserve independent decisionmaking by government officials and employees and to assure that they are not unfairly held liable for damages because they failed to predict developments in constitutional law. *Pierson v. Ray*, 386 U.S. 547 (1967). At the same time, this Court has noted that when qualified immunity is success-

fully asserted, a plaintiff whose constitutional rights have been deprived is denied compensation for that deprivation. Nevertheless, this Court has balanced the various individual and social interests and costs involved and has arrived at the present objective qualified immunity test in which clearly settled law is the focus. *See Harlow v. Fitzgerald, supra.*

Petitioner submits that important interests are undermined where clearly settled law is incorrectly understood by a Circuit Court of Appeals as requiring a case on all fours. The first is the interest in uniformity and consistency. §1983 is a federal statute and the qualified immunity test demands a national standard. It is an intolerable state of affairs when one circuit, the Seventh Circuit, adopts a qualified immunity test which conflicts with both this Court's case law and decisions of the Third, Fifth and Eighth Circuits.

The second important interest is that of government officials and employees in the development of clearly settled law. Clearly settled law is another way of characterizing constitutionally mandated rules governing official conduct. Ironically, however, an improper fact specific approach to clearly settled law means that clearly settled law will develop slowly, if at all.[7] The result is that in many cases government officials and employees will have to guess at the applicable constitutional rules of conduct. True, if they are sued, they will probably be held not liable because of the absence of clearly settled law in a fact specific sense. But it should not be overlooked that it is often important that constitutional rules be as clearly set out as

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[7] *See* Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 Wash.U.L.Q. 221, 259 (1984).

possible with a minimum of ambiguity so that government officials and employees can regulate their conduct accordingly.[8]

The third important interest is in constitutional compliance. This interest is undermined by a clearly settled law approach that inevitably leads to a finding of no liability under §1983. Such an approach amounts to an unwarranted underprotection of constitutional rights. That this occurred here in a First Amendment context is especially troublesome because improper retaliation for the exercise of First Amendment rights is, regrettably, not an unusual phenomenon.

Finally, recent decisions of this Court demonstrate its concern with §1983 qualified immunity and its view that the question of the proper standard for the clearly settled law inquiry is an important question worthy of attention. The Seventh Circuit's decision in this case has generated confusion on the issue, particularly in light of this Court's decisions in *Harlow* and *Anderson*, and the clear conflict with the Third, Fifth and Eighth Circuits. Thus, until the Seventh Circuit's decision is reviewed by this Court, there will be continued uncertainty as to the proper standard for qualified immunity in §1983 cases.

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[8] The present case is a good example: apparently it is still not clearly settled in the Seventh Circuit whether the conduct which a jury, district court judge and panel of the Seventh Circuit determined to be violative of the First Amendment did indeed violate the First Amendment.

IV.

THE SEVENTH CIRCUIT'S APPLICATION OF THE QUALIFIED IMMUNITY DEFENSE TO INTENTIONAL RETALIATION FOR THE EXERCISE OF CLEARLY SETTLED FIRST AMENDMENT RIGHTS CONFLICTS WITH THIS COURT'S DECISIONS AND WITH DECISIONS OF OTHER CIRCUITS.

Judge Easterbrook of the Seventh Circuit characterized the en banc decision in this case as stating the Seventh Circuit's "authoritative view" on the issue of qualified immunity. *Abel v. Miller*, 849 F.2d 1018 (7th Cir. 1988). In this case, though, the jury found that Respondents intentionally harassed and retaliated against Petitioner because he chose to exercise his clearly settled First Amendment rights. Given that finding, the Seventh Circuit erred in finding that Respondents were qualifiedly immune. Plaintiff submits that qualified immunity is not applicable in cases involving intentional retaliation for the exercise of clearly settled First Amendment rights. Thus, if the Seventh Circuit's decision is allowed to stand, government officials will be free, without fear of having to compensate their victims, to disregard the First Amendment rights of their citizens and employees in all but the most egregious cases. This constitutes unjustified underdeterrence of First Amendment rights.

The Seventh Circuit utilized a two-part analysis in determining the applicability of qualified immunity to this case: " '(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question?' " 850 F.2d at 1210; *see also, Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986). In the context of First Amendment *workplace* rights, the *Harlow* defense first comes into play when one asks whether the employee's conduct or speech was protected at the time of the challenged conduct. These workplace

cases often present difficult fact-specific balancing inquiries on the "public concern" question. Compare *Connick v. Myers*, 461 U.S. 138 (1983) with *Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891 (1987). Consequently, lower courts have found the qualified immunity defense applicable if a reasonably competent public official would have concluded that employee speech did not affect matters of public concern or were outweighed by the need for workplace harmony. *Garvie v. Jackson*, 845 F.2d 647 (6th Cir. 1988).

But this case involves no unsettled questions of law or the need to balance competing interests. The jury found that Respondents intentionally investigated and harassed Petitioner because of his protected conduct. This is a case where conduct is unlawful *because* of a discriminatory motivation and is thus no different from a case involving a finding of racial discrimination. In both instances a neutral act (be it a police investigation, denial of services, or termination of employment) is rendered unconstitutional because of discriminatory motivation. Similarly, in both cases defendants engaging in such discriminatory conduct violate clearly settled law because the applicable constitutional rules have been clearly settled for years. Thus, while the Seventh Circuit correctly stated that intentional First Amendment retaliation violates the Constitution, it erred in holding that Respondents, and public officials in general, can ever be qualified immune from liability for this misconduct.

In this case Respondents violated clearly settled First Amendment law. If any right can be said to be clearly established, it is that a person may criticize his or her government without fear of retaliation or reprisal. *New York Times v. Sullivan*, 376 U.S. 254 (1964); *City of Houston v. Hill*, ___ U.S. ___, 107 S.Ct. 2502, 2509 (1987). Just as no reasonable official can believe he could

constitutionally unleash the forces of government against a person in retaliation for his or her race, so, too, no reasonable official can believe he could take action against a citizen in retaliation for that citizen's exercise of clearly established First Amendment rights. Because Petitioner's conduct was protected under clearly First Amendment law, that should have resolved the *Harlow* inquiry in Petitioner's favor. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1051 n.29 (9th Cir. 1988).

The Seventh Circuit therefore erred (850 F.2d at 1213-14) in basing its immunity finding on the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The *Pickering* balance relates to cases where an admitted employer restraint on employee activity is justified by overriding workplace concerns. In this case the Seventh Circuit confused the *Pickering* balance with the issue of mixed motive and discriminatory intent. Under the First Amendment, retaliation against citizens in cases like this one can never be justified by any competing governmental interest. By confusing these issues, the Seventh Circuit improperly utilized the qualified immunity defense to negate a jury finding of intentional discrimination. Such a misapplication of *Harlow*, if allowed to stand, will improperly insulate discriminatory governmental actions from scrutiny. That certainly was not the intent of this Court in framing the objective *Harlow-Anderson* qualified immunity defense.

There are weighty reasons for this Court to grant this petition. First, this Court has not yet addressed the issue of the applicability of the qualified immunity defense in cases where intent (as opposed to reasonableness) is a crucial element of the constitutional violation. As Petitioner has shown, the Seventh Circuit confused the *Harlow-Anderson* prohibition against any inquiry into state of

mind for qualified immunity purposes with the necessary inquiry into state of mind for substantive First Amendment-*prima facie* case purposes. *See Note, Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126 (1985). This case thus presents an opportunity for the Court to deal with this issue.

Second, there is a split in the circuits on the applicability of qualified immunity in cases involving unconstitutional intentional discrimination. The Eighth, Ninth and District of Columbia Circuits have held that qualified immunity is not a defense in cases involving intentional discrimination. *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988); *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541 (8th Cir. 1984); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). The Seventh Circuit's ruling in this case that public officials can be relieved of liability even where a plaintiff "has presented evidence sufficient to support his claim of retaliation," 850 F2d at 1211, conflicts with these decisions and improperly extends the reach of qualified immunity beyond its intended scope. It therefore cannot be allowed to stand.

Finally, the question whether, and to what extent, the *Harlow-Anderson* qualified immunity defense applies to cases involving intentional discrimination violative of the First Amendment is an important one which will recur. Unless this Court reviews the Seventh Circuit's decision, confusion and uncertainty will continue in the Circuits at the expense of First Amendment rights.

V.

THE SEVENTH CIRCUIT'S *MOUNT HEALTHY*-FIRST AMENDMENT LIABILITY RULING CONFLICTS WITH A DECISION OF THIS COURT.

In addition to ruling against the Petitioner on qualified immunity grounds, the Seventh Circuit also engaged in an exhaustive analysis of the facts in reaching its conclusion that there was insufficient evidence of retaliation violative of the First Amendment to submit the issue to the jury. In so doing, as Judge Ripple pointed out in dissent, Appendix A, p. 68, the Seventh Circuit en banc improperly constituted itself as a factfinder. That is, it substituted its factfinding judgment for that of the jury in a situation where reasonable persons could differ, especially as to issues of motivation implicating credibility.

More important for present purposes, the Seventh Circuit erred in a manner which directly conflicts with this Court's decision in *Mount Healthy City School District v. Doyle, supra. Mount Healthy* held that a plaintiff has the burden of proving by a preponderance of the evidence that the defendant's impermissible motivation was a "substantial factor" in bringing about the challenged conduct. In its opinion, the Seventh Circuit purported to apply this part of the *Mount Healthy* test—which constitutues a *constitutional* requirement—when it ruled against the Petitioner. However, the Seventh Circuit erred when it asserted that in order to carry the substantial factor burden, a plaintiff must prove that had it not been for the violation, the injury complained of would not have occurred.[9] In so doing, the court improperly converted this substan-

[9] Appendix A, p. 16.

tial factor part of *Mount Healthy* into a requirement that the Petitioner prove that retaliation for the exercise of First Amendment rights was the "but-for" motivation of the Respondents, a more onerous burden.[10]

But-for causation does indeed play a role in applying *Mount Healthy* to mixed motive cases, but *only as to remedy*.[11] That is, under *Mount Healthy*, where a plaintiff shows a First Amendment violation by proving that the defendant retaliated against him or her for motives impermissible under the First Amendment, the defendant can still avoid liability for compensatory damages by showing by a preponderance of the evidence that the same damages would have been incurred by the plaintiff even in the absence of the unconstitutional conduct. This is the second part of the *Mount Healthy* test. But even where a defendant succeeds in making this but-for showing (really a showing of the *absence* of but-for causation), there is nevertheless a First Amendment violation so that the plaintiff may be able to recover nominal damages, or per-

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[10] The Seventh Circuit appears to have made the same error in *Garza v. Henderson*, 779 F.2d 390 (7th Cir. 1986). The court assumed that the plaintiff inmate's procedural due process rights were violated by the failure of the prison disciplinary committee to provide him with an opportunity for an in-person hearing. Yet, the Seventh Circuit concluded nevertheless that the *plaintiff* did not prove any causal connection between the sanction imposed on him and the procedural due process violation. This was incorrect: under *Mount Healthy*, once the plaintiff inmate proved a procedural due process violation, the defendants had the burden of proving by a preponderance that the plaintiff would have had the sanction imposed on him even in the absence of the procedural due process violation. If they could made this showing, they would not be liable for damages resulting from the imposition of the sanction.

[11] *See* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, 199-200 (2nd ed. 1986).

haps even punitives in appropriate circumstances, as well as attorney's fees because the plaintiff is a prevailing party.

Despite this clear distinction between the first, substantial factor part of the *Mount Healthy* test which is constitutional in nature and the second, but-for part which deals only with damages, the Seventh Circuit confused the two in several determinative respects.[12] For one thing, as noted, it mistakenly applied the but-for test as the first part of the *Mount Healthy* test. For another, it asserted incorrectly that since, in its view of the facts, Respondents demonstrated that they would have acted in the same way even in the absence of the impermissible motivation, then Respondents did not violate the First Amendment.[13] This is simply not so: there was still a First Amendment violation even if the Respondents might then be liable for less in the way of damages. Consequently, the ruling of the Seventh Circuit regarding Respondents' First Amendment liability conflicts with an important decision of this Court.

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[12] This confusion is apparent in the Seventh Circuit's following comment, made in passing, regarding the *Mount Healthy* "substantial factor" burden: "Whether or not these several definitions differ to any significant degree and irrespective of the language used, the plaintiff's burden is not insubstantial." Appendix A, p. 16. With all respect, Petitioner submits that the proper definition of the "substantial factor" part of the *Mount Healthy* test and the language used in describing it are indeed crucial.

[13] Appendix A, p. 35, n.12.

VI.

THE SEVENTH CIRCUIT'S *MOUNT HEALTHY*-FIRST AMENDMENT LIABILITY RULING IMPLICATES IMPORTANT INTERESTS THAT MERIT THIS COURT'S ATTENTION.

This Court should review the Seventh Circuit's misstatement of the *Mount Healthy* test in order to clarify the crucial distinction in §1983 cases between the constitutional aspect of that test and the damages aspect. Because of the large number of civil rights cases that arise in an employment discharge setting, the correct understanding by courts of *Mount Healthy* is necessary for the proper functioning of the litigation process. Juries must be clearly instructed as to the allocation of the respective burdens of proof on the constitutional and damages issues. Similarly, in deciding whether to submit these issues to juries in the first place or to overturn jury verdicts, courts must state and apply *Mount Healthy* correctly. In addition, *Mount Healthy* has significant implications for liability for compensatory and punitive damages and attorney's fees. Moreover, because the *Mount Healthy* test arises most often in the context of §1983, a federal statute, there is an important interest in uniformity.

The Seventh Circuit is apparently not alone in its misstatement of *Mount Healthy*. For example, the Ninth Circuit stated in *Fujiwara v. Clark*, 703 F.2d 357, 361 (9th Cir. 1983) that "if [plaintiff] was discharged in substantial part because of her exercise of her right to speak out on issues of public importance, that discharge violated her First Amendment rights *unless the employer would have reached the same decision in the absence of the protected conduct.*" (emphasis added). This indicates that the Ninth Circuit believes that a defendant who carries the but-for burden has proved that the plaintiff's constitutional rights

have not been violated. However, as argued, this *Mount Healthy* but-for burden of the defendant is relevant only as to damages.

The issue is thus a recurring one which will continue to engender confusion because of the Seventh Circuit's ruling unless this Court reviews that ruling and clarifies what it declared in *Mount Healthy*.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted to review the Seventh Circuit's rulings on the qualified immunity issues and the *Mount Healthy*-First Amendment liability issue.

Respectfully submitted,

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